

Inland Waters Pollution Control, Inc., W.T. Employee Services, Inc., Industrial Waste Transportation, Inc. (d/b/a Central Maintenance, Inc.) and Hydro-Mechanical Cleaning, Inc.) and International Brotherhood of Teamsters, AFL-CIO, Local 247,¹ Petitioner and International Union of Operating Engineers, Local 324, AFL-CIO/Laborers' Union of North America, AFL-CIO, Local 334, Joint-Petitioner. Cases 7-RC-19322 and 7-RC-19332

February 18, 1992

DECISION ON REVIEW AND ORDER
REMANDING

CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered the Joint-Petitioner's objections to an election held December 21, 1990, and the Regional Director's report and recommendations on their disposition. The election was conducted pursuant to a Stipulated Election Agreement approved on December 5, 1990. The tally of ballots shows 83 for Petitioner, 51 for Joint-Petitioner, and 3 votes against the participating labor organizations, with 15 challenged ballots, an insufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and the briefs, and for the reasons stated below does not adopt the Regional Director's recommendation to sustain Objection I and set aside the election.²

No facts are in dispute. The stipulated agreement scheduled a morning voting period, from 5-8:30, and an afternoon period, from 3-5:30. All parties had been requested to arrive for orientation one-half hour before the morning voting session for the purpose of, among other things, instructing the duly designated election observers about their duties. Although a representative of the Joint-Petitioner was present at the orientation session, its designated observer, Dennis Richeson, did not arrive until after the morning voting period began. The Joint-Petitioner's representative learned in a telephone call to Richeson's home that Richeson was en route. The Board agent denied the Joint-Petitioner's re-

quest to delay the election, and the Joint-Petitioner did not appoint another observer. Approximately 15 minutes into the first half hour of voting, Richeson arrived, voted, and asked to assume his duties. The Board agent refused to allow him to do so. Richeson did serve as the Joint-Petitioner's observer during the afternoon polling period.

In sustaining the objection, the Regional Director noted that the Board has held that in a binding stipulated election agreement, the provision for observers is a material term, and that the use of observers by the parties is a right. Citing *Best Products Co.*, 269 NLRB 578 (1984), he acknowledged that parties, by their conduct, may waive their contractual right to observers, but rejected the contention made by the Petitioner and the Employer that a waiver occurred in the instant case, reasoning that Richeson was available for the vast bulk of the voting period and no evidence was offered to suggest that allowing him to assume observer's duties would have disrupted the election process.

In their exceptions, the Petitioner and the Employer reiterate their arguments to the Regional Director that (1) the Board agent's conduct did not result in a material and/or prejudicial breach of the election agreement, and (2) Joint-Petitioner waived its right to an observer by failing to select an alternate prior to the start of the voting session, particularly since a representative of the Joint-Petitioner was present. They rely on cases which indicate that a party's failure to appoint an alternative observer when given the opportunity constitutes a waiver of the right.³

Contrary to the Regional Director, we find that no material breach of the election agreement occurred in the circumstances of this case. Thus, Richeson arrived 15 to 20 minutes after the morning voting period had begun. No reason was offered for his lateness, and the Joint-Petitioner does not allege that it was due to some act of the Board agent or the parties to the election.⁴ Although a representative of the Joint-Petitioner was

³ *Northern Telecom*, 297 NLRB 256 (1989); *Best Products Co.*, 269 NLRB 578 (1984), aff'd. 765 F.2d 903 (9th Cir. 1985).

⁴ In this regard, the instant case is distinguishable from *Asplundh Tree-Expert Co.*, 283 NLRB 1 (1987). In *Asplundh*, the petitioner learned 15 to 30 minutes before the start of the election that the employer was being permitted to station two observers at one of the polling sites. When he protested the disparity in the number of observers to the Board agent at the site, the agent told him to file an objection. Although the record in the instant case does not indicate one way or the other whether the Joint-Petitioner's representative asked or was advised that he could designate a substitute, neither does it indicate that he was informed that his only recourse was to file an objection after the election. Additionally, unlike *Asplundh*, the Board agent was not responsible for the changed conditions under which the election proceeded. Cf. *Sugar Food, Inc.*, 293 NLRB 1008 fn. 1 (1989).

Clearly the Board agent properly denied the Joint-Petitioner's representative's request to delay the start of the election, for to have departed from the agreed-to starting time could have disenfranchised voters. *Nyack Hospital*, 238 NLRB 257 (1987).

¹ The name of the Petitioner has been changed to reflect the new official name of the International Union.

² The Joint-Petitioner filed four objections, of which two (Objections II and IV) were overruled by the Regional Director. In the absence of exceptions, the Board adopts the Regional Director's determination on these objections. The Regional Director also determined that in the event the Board disagreed with his recommended disposition of Objection I, a hearing should be conducted on Objection III which alleges that the Petitioner's election observer was a supervisor. In view of our decision to overrule Objection I, we shall remand this case to the Regional Director for a hearing on Objection III.

present at the preelection conference and knew Richeson was running late and would likely not arrive before the polls opened, he did not designate a substitute observer. His failure to do so indicated that the Joint Petitioner was willing to risk its right to be represented at the morning session on Richeson's late appearance, or even nonappearance if he failed to show up for that session, and thus in either case, to accept the consequences that would flow from Richeson's unexplained timely failure to appear as the Joint-Petitioner's designated observer. Accordingly, we find there was no material breach of the stipulation by virtue of the Board agent's conduct in question and that the Regional Director's reliance on that ground is misplaced.

We also find that the Board agent acted reasonably and within her discretion in refusing to allow Richeson to assume his duties as an observer during the morning voting period. The Board's policy of permitting the parties to use election observers presumes that those who designate observers will see to it that their designees present themselves at the appropriate times and places, i.e., at the polling place prior to the scheduled starting time for the election. When a designated observer arrives after the election has begun and while voting is underway, it is incumbent on the Board agent conducting the election to determine whether circumstances are such that he can instruct and position the late-arriving observer without interrupting the polling, or with a minimum of interruption, and without creating an impression of partiality or some other impression of unfairness.⁵ In the instant case, the Board agent made a determination that was not improper or unreasonable.⁶

We disagree with our dissenting colleague that it "logic[ally]" follows that because the right to an observer is a material term of the election agreement and because the Board agent refused to seat Richeson, the

denial was a material breach of the agreement. The right to an observer, while material, is not absolute. It is an implicit condition of an election agreement that the observer to which a party is entitled will show up in time to carry out his or her functions without risking disruption of the election. If, as here, a party's observer arrives when the election is well underway and the Board agent makes a reasonable judgment that instructing and installing the observer at that point would disrupt the election, and if, as here, the party has failed to take reasonable steps to make up for the late arrival—such as appointing an alternate available to serve in the designated observer's place—then the party's own conduct has prevented it from securing its "right" to an observer.⁷ Although the issue can be formulated as whether the party has "waived" its right by its conduct, it can also be stated in terms of the nature of the right at issue. The "right" which the Joint-Petitioner seeks—to have a late-arriving observer inserted into the election—was not plainly guaranteed by the election stipulation agreement. In short, at that point there was no guaranteed right to be waived.⁸

On the basis of the foregoing, we find the objection should be overruled.⁹

ORDER

It is ordered that the Joint-Petitioner's Objection I is overruled.

IT IS FURTHER ORDERED that the above-entitled proceeding is remanded to the Regional Director for Region 7 for action consistent with this decision.

MEMBER RAUDABAUGH, dissenting.

I dissent. A party to an election has a right to the presence of an observer, and this right is embodied in the stipulated election agreement.¹

My colleagues do not quarrel with the proposition that the right to an observer is a material term of the

⁵ It is true, as the court stated in *NLRB v. Best Products Co.*, 765 F.2d 903 (9th Cir. 1985), affg. 271 NLRB 1058 (1984), that observers have uncomplicated tasks and are rapidly trained. However, in instances such as this, it is the responsibility of the Board agent conducting the election to determine whether and to what degree training and placing a late-arriving observer will interrupt the election. The Board agent may find himself between the proverbial "rock and a hard place" in making such an assessment for, while the absence of an observer for one party may create an impression of partiality, so too may instructing and positioning a party's late observer.

⁶ Chairman Stephens further notes that the Joint-Petitioner has not established that it was prejudiced by the Board agent's conduct. An observer's principal task is identifying voters. In the main this entails challenging persons a party believes are not eligible to vote. The Joint-Petitioner has not raised a question concerning the challenges made during the election or asserted that ballots cast by voters it had reason to challenge went unchallenged and affected the results of the election.

Member Oviatt finds it unnecessary to rely on this reason, i.e., the absence of any assertion concerning the Joint-Petitioner's ability to challenge voters, as a basis for finding that the Board agent's conduct was not objectionable.

⁷ Contrary to our dissenting colleague's assertion, our disposition of this case does not run counter to the Board's casehandling guidelines which advise that "care must be taken in any doubtful case, to accord each party every opportunity for representation." NLRB Casehandling Manual: Representation Proceedings (Part Two), Sec. 11310. We construe that as guaranteeing parties every "reasonable" opportunity for representation through observers, and, as indicated above, we think that permitting Richeson to assume his duties as an observer during the second polling session did not amount to failing to accord the Joint Petitioner every reasonable opportunity under the circumstances.

⁸ The same result might obtain if, for example, a party's observer showed up inebriated and disorderly. Keeping such an observer from participating in the election would not be a material breach of the election agreement under any reasonable interpretation, even though it might deprive a party of its "right" to an observer and even though the party did not intend to waive that right.

⁹ In view of our disposition of this case, we find it unnecessary to determine whether the Joint-Petitioner's conduct constitutes a waiver of its right to an observer at the morning polling session.

¹ *Summa Corp. v. NLRB*, 625 F.2d 293 (9th Cir. 1980); *Breman Steel Co.*, 115 NLRB 247 (1956).

election agreement. Nor can they dispute the fact that the Joint-Petitioner was denied the right to have an observer present for a substantial part of the election, when that observer was available to serve. In these circumstances, it would seem to follow, as a matter of logic and law, that the denial was a material breach of the agreement. I fail to see the basis for my colleagues' contrary conclusion.

The Employer and Petitioner argue that the Joint-Petitioner waived its right to have an observer for the morning session of the election. The evidence falls far short of establishing such a waiver. The fact that the Joint-Petitioner did not seek a substitute observer does not establish that it was agreeing not to have an observer at all for the morning session. The Joint-Petitioner requested a delay in the election because its designated observer had not yet arrived at the polling place. When the observer arrived, no later than 30 minutes into the 3-1/2-hour morning voting session, he immediately sought to begin his duties. This conduct is consistent with what should be obvious: the Joint-Petitioner, having failed to secure a delay in the election, hoped to seat the observer when he arrived. Furthermore, there is no evidence that the Board agent told the Joint-Petitioner prior to the election that it could switch observers at the last moment or that a late-arriving observer would not be permitted to participate in the morning session.

As noted, the Employer and the Petitioner argue their case in terms of waiver of the right to have an observer. My colleagues, apparently recognizing the difficulties of this position, seek to avoid a waiver analysis by creating a limitation on the right. In their view, the right to have an observer is implicitly limited by the condition that the observer "will show up in

time to carry out his or her functions without risking disruption of the election." Assuming *arguendo* that this created condition exists, my colleagues have failed to explain how permitting participation by the late-arriving observer in this case would have risked disruption of the election. The Regional Director specifically found that "there is no evidence offered to suggest that to allow [Joint-Petitioner's observer] to assume his duties at the time he presented himself to the Board Agent would have disrupted the election process." Further, the duties of an observer are uncomplicated and can be easily explained.² Finally, there is no record basis for the majority's suggestion that the Board agent relied on any actual or potential disruption as a reason for refusing to seat the observer.³

In sum, because the presence of observers is important to the election process, and in view of the fact that the right to an observer was not waived, and in the absence of a showing that the seating of the observer would have been disruptive, I would uphold the Regional Director's finding that the failure to accord this important right was objectionable.⁴

² *NLRB v. Best Products Co.*, 765 F.2d 903, 907 (9th Cir. 1985).

³ Indeed, the Board agent's automatic exclusion of a late-arriving observer, even though at least 3 hours remained in the morning polling session, was contrary to the Board's advisory casehandling guidelines, which state in relevant part (NLRB Casehandling Manual, Representation Proceedings (Part Two), Sec. 11310):

Parties may waive the opportunity to be represented by observers, either expressly or by default (no observers appearing), *but care must be taken, in any doubtful case, to accord each party every opportunity for representation.* [Emphasis added.]

⁴ The majority hypothesizes a situation where an observer shows up in an inebriated or disorderly state. In such circumstances, the seating of such an observer would likely be disruptive of the election. Suffice it to say that my position is confined to the facts of this case.